



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R05-OAR-2012-0990; FRL-10002-03-Region 5]

**Air Plan Approval; Ohio; Prevention of Significant Deterioration
Greenhouse Gas Tailoring Rule**

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve, under the Clean Air Act (CAA), a revision to Ohio's State Implementation Plan (SIP), submitted by the Ohio Environmental Protection Agency (OEPA) on March 30, 2011 and amended on August 22, 2019. The proposed SIP revision modifies Ohio's Prevention of Significant Deterioration (PSD) program to establish emission thresholds for determining when stationary source projects are potentially subject to Ohio's PSD permitting requirements for greenhouse gas (GHG) emissions. Consistent with Ohio's August 22, 2019, request, EPA is not acting on the portion of Ohio's submittal that would allow for automatic rescission of certain rule provisions and permit terms and conditions if certain triggering events occurred (i.e., the auto-rescission clause).

DATES: Comments must be received on or before **[insert date 30 days after date of publication in the Federal Register]**.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-R05-OAR-2012-0990 at <http://www.regulations.gov>, or via email to ogulei.david@epa.gov. For comments submitted at Regulations.gov, follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from Regulations.gov. For either manner of submission, EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (i.e. on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the "For Further Information Contact" section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www2.epa.gov/dockets/commenting-epa-dockets>.

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SUPPLEMENTARY INFORMATION: Throughout this document whenever
“we,” “us,” or “our” is used, we mean EPA. This supplementary
information section is arranged as follows:

- I. Background for our Proposed Action
- II. EPA’s Analysis of the State’s Submittal
- III. What Action is EPA Taking?
- IV. Incorporation by Reference.
- V. Statutory and Executive Order Reviews.

I. Background for our Proposed Action

This section briefly summarizes EPA’s GHG-related actions
that provide the background for this proposed action. More
detailed discussion of the background is found in the preambles
for those actions. In particular, background information is
contained in what we call the GHG PSD SIP Narrowing Rule¹, and in
the preambles to the actions it cites.

A. GHG-Related Actions

¹See “Limitation of Approval of Prevention of Significant Deterioration
provisions Concerning Greenhouse Gas Emitting-Sources in State Implementation
Plans; Final Rule.” 75 FR 82536 (December 30, 2010).

EPA has undertaken a series of actions pertaining to the regulation of GHGs that establish the overall framework for this proposed action on the Ohio SIP. Four of these actions include, as they are commonly called, the "Endangerment Finding" and the "Cause or Contribute Finding," which EPA issued in a single final action;² the "Johnson Memo Reconsideration;"³ the "Light-Duty Vehicle Rule (LDVR);"⁴ and the "Tailoring Rule."⁵ Taken together and in conjunction with the CAA, these actions established regulatory requirements for GHGs emitted from new motor vehicles and new motor vehicle engines; determined that such regulations, when they took effect on January 2, 2011, subjected GHGs emitted from stationary sources to PSD requirements; and limited the applicability of PSD requirements to GHG sources on a phased-in basis. EPA took this limiting action in the GHG Tailoring Rule (Tailoring Rule), which more specifically established appropriate GHG emission thresholds for determining the applicability of PSD requirements to GHG-emitting sources.

²"Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act." 74 FR 66496 (December 15, 2009).

³See "Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs." 75 FR 17004 (April 2, 2010).

⁴"Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule." 75 FR 25324 (May 7, 2010).

⁵"Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Final Rule." 75 FR 31514 (June 3, 2010).

PSD is implemented through the SIP system, and so in December 2010, EPA promulgated several rules to implement the new GHG PSD SIP program. Recognizing that some states had approved SIP PSD programs that did not apply PSD to GHGs, EPA issued a SIP call and, for some of these states, a Federal Implementation Plan (FIP).⁶ States without approved SIP programs must implement the Federal PSD requirements in 40 Code of Federal Regulations (CFR) 52.21. Recognizing that other states had approved SIP PSD programs that do apply PSD to GHGs, but that do so for sources that emit as little as 100 or 250 tons per year (tpy) of GHG, and that do not limit PSD applicability to GHGs to the higher thresholds in the Tailoring Rule, EPA issued the GHG PSD SIP Narrowing Rule. Under that rule, EPA withdrew its approval of the affected SIPs to the extent those SIPs covered GHG-emitting sources below the Tailoring Rule

⁶Specifically, by action dated December 13, 2010, EPA finalized a "SIP Call" that would require those states with SIPs that have approved PSD programs but do not authorize PSD permitting for GHGs to submit a SIP revision providing such authority. See "Action to Ensure Authority to Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call," 75 FR 77698 (Dec. 13, 2010). EPA has made findings of failure to submit that would apply in any state unable to submit the required SIP revision by its deadline, and finalizing FIPs for such states. See, e.g., "Action To Ensure Authority To Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Findings of Failure To Submit State Implementation Plan Revisions Required for Greenhouse Gases," 75 FR 81874 (December 29, 2010); "Action To Ensure Authority To Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Federal Implementation Plan," 75 FR 82246 (December 30, 2010).

thresholds. EPA based its action primarily on the "error correction" provisions of CAA section 110(k)(6).

As of January 2, 2011, GHG emissions were, for the first time, covered by the title V operating permit and PSD programs via the Tailoring Rule. In Step 1 of the Tailoring Rule (Step 1), EPA limited application of title V and PSD requirements to sources and modifications of GHG emissions, but only if they were subject to PSD or title V "anyway" due to their emissions of pollutants other than GHGs. These sources and modifications covered under Step 1 are commonly referred to as "anyway sources" and "anyway modifications", respectively.

In Step 2 of the Tailoring Rule (Step 2), which applied as of July 1, 2011, the PSD and title V requirements extended beyond the sources and modifications covered under Step 1 to apply to sources that were classified as major sources based solely on their GHG emissions or potential to emit GHGs. Step 2 also applied PSD permitting requirements to modifications of otherwise major sources that would increase only GHG emissions above the level in the Federal PSD regulations. EPA generally described the sources and modifications covered by PSD under Step 2 of the Tailoring Rule as "Step 2 sources and modifications" or "GHG only sources and modifications."

In accordance with the phase-in process of the Tailoring Rule, EPA published Step 3 of the Tailoring Rule on July 12, 2012. See 77 FR 41051. In this rule, EPA decided against further phase-in of the PSD and title V requirements for sources emitting lower levels of GHG emissions, thus the GHG thresholds remained the same as established in Steps 1 and 2 of the Tailoring Rule.

Federal courts have resolved several challenges to the Tailoring Rule and other EPA actions regarding GHGs. On June 26, 2012, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) upheld the Endangerment Finding, LDVR, Tailoring Rule, and other actions pertinent to the regulation of GHGs under the PSD and title V programs. After an appeal of this case, on June 23, 2014, the U.S. Supreme Court addressed the application of stationary source permitting requirements to GHG emissions in *Utility Air Regulatory Group (UARG) v. EPA*, 134 S. Ct. 2427 (2014). The Supreme Court upheld EPA's regulation of GHG Step 1 or "anyway" sources, but held that EPA may not treat GHGs as air pollutants for the purpose of determining whether a source is a major source or is undergoing a major modification and thus require the source to obtain a PSD or title V permit. Therefore, the Court invalidated the PSD and

title V permitting requirements for Step 2 sources and modifications.

In accordance with the Supreme Court's decision, on April 10, 2015, the D.C. Circuit issued an Amended Judgment⁷ vacating the regulations that implemented Step 2 of the Tailoring Rule, but not the regulations that implement Step 1 of the Tailoring Rule. The 2015 Amended Judgment specifically vacated the EPA regulations under review (including 40 CFR 51.166(b)(48)(v) and 40 CFR 52.21(b)(49)(v)) "to the extent they require a stationary source to obtain a PSD permit if greenhouse gases are the only pollutant (i) that the source emits or has the potential to emit above the applicable major source thresholds, or (ii) for which there is a significant emissions increase from a modification." *Id.* at 7-8.

In a subsequent rulemaking, on August 19, 2015, EPA removed from the CFR several provisions of the PSD and title V permitting regulations that were originally promulgated as part of the Tailoring Rule. See "Prevention of Significant Deterioration and title V Permitting for Greenhouse Gases: Removal of Certain Vacated Elements" (80 FR 50199, August 19, 2015). This "good cause" final rule removed from the Federal regulations the portions of the PSD permitting provisions for

⁷See *Coalition for Responsible Regulation, Inc. v. EPA*, 606 Fed. Appx. 6, 7 (D.C. Cir. 2015).

Step 2 sources that were vacated by the D.C. Circuit (i.e. 40 CFR 51.166(b)(48)(v) and 52.21(b)(49)(v)). EPA therefore no longer has the authority to conduct PSD permitting for Step 2 sources. On October 3, 2016, EPA proposed revisions to the PSD permitting regulations applicable to GHGs to address the GHG applicability threshold for PSD in order to fully conform with the 2014 UARG decision and the 2015 Amended Judgment, but those revisions have not been finalized. See 81 FR 68110.

B. Ohio's Actions

The Tailoring Rule requested all states to submit a letter to EPA, by August 2, 2010, explaining how the state intended to implement the GHG PSD and title V permitting requirements and whether it had authority to implement those requirements. 75 FR 31514 (June 3, 2010). On July 26, 2010, Ohio provided a letter to EPA confirming that the state has the authority to regulate GHGs in its PSD program. The letter provided that Ohio intended to apply the meaning of the term "subject to regulation" that EPA established in the Tailoring Rule. The letter also confirmed Ohio's intent to amend its air quality rules for the PSD program for GHGs to match the thresholds set in the Tailoring Rule. See the docket for this proposed rulemaking for a copy of Ohio's letter.

In the SIP Narrowing Rule, 75 FR 82536 (December 30, 2010), EPA withdrew its approval of certain provisions of Ohio's SIP, among other SIPs, to the extent that those provisions applied PSD permitting requirements to GHG emissions from sources emitting at levels below those set in the Tailoring Rule.⁸ As a result, Ohio's current SIP provides the state with authority to regulate GHGs but only at and above the Tailoring Rule thresholds; and requires new and modified sources to receive a PSD permit based on GHG emissions only if they emit at or above the Tailoring Rule thresholds.

Ohio's proposal to revise its SIP so as to limit PSD applicability to the higher GHG emissions thresholds in the Tailoring Rule is consistent with CAA section 110(a)(2)(E)(i), which requires states to provide necessary assurances that they have adequate funding and personnel to implement their SIPs. In the Tailoring Rule, EPA established higher thresholds for PSD applicability to GHG-emitting sources on grounds that the states generally did not have adequate resources to apply PSD to GHG-emitting sources below the Tailoring Rule thresholds,⁹ and no

⁸"Limitation of Approval of Prevention of Significant Deterioration Provisions Concerning Greenhouse Gas Emitting-Sources in State Implementation Plans; Final Rule." 75 FR 82536 December 30, 2010)

⁹Tailoring Rule, 75 FR 31517.

state, including Ohio, asserted that it did have adequate resources to do so.¹⁰

In the SIP Narrowing Rule, EPA found that the affected states, including Ohio, had a flaw in their SIPs at the time they submitted their PSD programs, which was that the applicability of the PSD programs was potentially broader than the resources available to them under their SIP.¹¹ Accordingly, for each affected state, including Ohio, EPA concluded, under CAA section 110(k)(6), that EPA's action in approving the SIP was in error, and EPA rescinded its approval to the extent the PSD program applies to GHG-emitting sources below the Tailoring Rule thresholds.¹² EPA recommended that states adopt a SIP revision to incorporate the Tailoring Rule thresholds, thereby (i) assuring that under state law, only sources at or above the Tailoring Rule thresholds would be subject to PSD; and (ii) avoiding confusion under the federally-approved SIP by clarifying that the SIP only applies to sources at or above the Tailoring Rule thresholds.¹³ Ohio revised its PSD and title V rules by creating Ohio Administrative Code (OAC) rules 3745-31-34 and 3745-77-11, respectively (Ohio's GHG rules) to ensure that its authority to implement GHG permitting requirements

¹⁰PSD SIP Narrowing Rule, 75 FR 82540

¹¹*Id.* at 82542

¹²*Id.* at 82544

¹³*Id.* at 82540

under the PSD and title V programs is consistent with the authority authorized by EPA in the Tailoring Rule. Ohio's rule revisions also incorporated the GHG PSD applicability thresholds that EPA established in the Tailoring Rule. Approval of Ohio's SIP revision would resolve a flaw in the SIP as addressed by the SIP Narrowing Rule.

II. EPA's Analysis of the State's Submittal

The regulatory revisions that OEPA submitted for approval on March 30, 2011, establish thresholds for determining which stationary sources and modifications become subject to permitting requirements for GHG emissions under OEPA's PSD program. Specifically, the submittal includes proposed changes to Ohio's PSD regulations and requests that EPA approve and incorporate into Ohio's federally-approved SIP OAC rule 3745-31-34, that Ohio adopted on March 21, 2011. Upon approval, this revision to Ohio's SIP will put in place the GHG emission thresholds for PSD applicability set forth in EPA's Tailoring Rule which will clarify the applicable GHG thresholds in the Ohio SIP.

Ohio is currently a SIP-approved state for the PSD program and has previously incorporated some elements of EPA's 2002 New Source Review (NSR) reform revisions, 67 FR 80186 (December 31, 2002) for PSD into its SIP, 75 FR 8496 (February 25, 2010). In

a letter provided to EPA on July 26, 2010, Ohio notified EPA of its interpretation that the state currently has the authority to regulate GHGs under its PSD regulations. Ohio's PSD SIP, which EPA approved prior to the promulgation of the Tailoring Rule, applies to major stationary sources (having the potential to emit at least 100 tpy or 250 tpy or more of a regulated NSR pollutant, depending on the type of source) or modifications undertaken in areas designated attainment or unclassifiable with respect to the National Ambient Air Quality Standards.

On August 22, 2019, Ohio sent a letter to EPA requesting that EPA not act on OAC 3745-31-34(C) and (D) as well as OAC 3745-77-11, but to move forward with the approval of the remainder of OAC 3745-31-34 (OAC 3745-31-34(A), (B), (E), (F) and (G)), thus amending Ohio's March 30, 2011 SIP submittal. OAC 3745-31-34(C) and (D) would allow for automatic rescission of certain GHG rule provisions and permit terms and conditions if certain triggering events occurred. Such provisions are commonly referred to as "auto-rescission" provisions or clauses. Consistent with Ohio's request, EPA is not acting on the auto-rescission provisions in this proposed approval. Per Ohio's request, EPA is also not acting on OAC 3745-77-11, Ohio's GHG title V rule.

The Ohio rules at OAC 3745-31-34(A) and (B) both include the 100,000 tpy carbon dioxide equivalent (CO₂e) Step 2 source threshold which EPA no longer uses or enforces per the 2014 UARG decision and 2015 Amended Judgment. EPA proposes to approve OAC 3745-31-34(A) and (B) even though they include the outdated 100,000 tpy CO₂e Step 2 threshold because those rules no longer authorize the regulation of Step 2 sources. Paragraph OAC 3745-31-34 (A) requires permits for new major stationary sources that will emit or have the potential to emit 100,000 tpy or more of CO₂e, and for modifications of existing stationary sources that will result in a net emissions increase of 75,000 tpy or more of CO₂e, as provided in the Ohio GHG rule and "only to the extent required in 40 CFR Section 151.166." EPA interprets the phrase **"and only to the extent required in 40 CFR Section 51.166"** in Ohio's rule to mean that Ohio will only regulate GHGs to the extent required in 40 CFR 51.166 (the Federal requirements governing PSD provisions in SIPs). Therefore, Ohio will regulate the Step 1 sources (75,000 tpy CO₂e threshold) and not the Step 2 sources (100,000 tpy threshold) as provided in 40 CFR 51.166. EPA notes that Ohio's August 26, 2014 guidance document titled "July 2014 GHG Air Pollution Permitting Change, Engineering Guide #85" describes how the UARG decision affects Ohio's GHG permitting program and how Ohio will no longer

require PSD or title V for Step 2 sources in response to the UARG decision. Ohio's guidance document says Ohio will continue to require new or modified Step 1 sources to apply Best Available Control Technology (BACT) for GHGs and will continue to use the 75,000 tpy CO₂e threshold to determine if the permits need to include BACT for GHGs until such time as EPA issues a revised threshold. Ohio's guidance document also explains that OAC 3745-31-34 will be implemented in line with the UARG decision and EPA's subsequent regulatory revisions.

For the above reasons, EPA finds that Ohio is properly regulating GHGs in accordance with the 2014 UARG decision and 2015 Amended Judgement. Although OAC 3745-31-34(A) and (B) contain the 100,000 CO₂e tpy Step 2 threshold which the UARG decision says cannot be enforced, EPA is proposing to approve those rules because Ohio is not regulating the Step 2 sources, and is only regulating the Step 1 sources.

III. What Action is EPA Taking?

EPA is proposing to approve Ohio's March 30, 2011, SIP submittal, as amended on August 22, 2019, relating to PSD requirements for GHG-emitting sources in OAC 3745-31-34. Specifically, Ohio's proposed SIP revision would establish appropriate emissions thresholds for determining PSD applicability for new and modified GHG-emitting sources in

accordance with EPA's Tailoring Rule and the 2014 UARG decision. Per Ohio's August 22, 2019, amended SIP request, EPA is not acting on the OAC 3745-31-34(C) and (D) auto-rescission clause or OAC 3745-77-11, which is Ohio's GHG title V rule.

If EPA does approve Ohio's changes to its air quality regulations to incorporate the appropriate thresholds for GHG permitting applicability into Ohio's SIP, then 40 CFR 52.1873(b), as included in EPA's SIP Narrowing Rule, which codifies EPA's limiting its approval of Ohio's PSD SIP to not cover the applicability of PSD to GHG-emitting sources below the Tailoring Rule thresholds, is no longer necessary. In this proposed action, EPA is proposing to amend 40 CFR 52.1873(b) to remove this unnecessary regulatory language.

IV. Incorporation by Reference.

In this rule, EPA is proposing to include in a final EPA rule regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is proposing to incorporate by reference Ohio OAC 3745-31-34 (A), (B), (E), (F) and (G) effective on March 31, 2011. EPA has made, and will continue to make, these documents generally available through www.regulations.gov and at the EPA Region 5 Office (please contact the person identified in the "For Further Information Contact" section of this preamble for more information).

V. Statutory and Executive Order Reviews.

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866;
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);

- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally

permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: October 31, 2019.

Cheryl L Newton,
Acting Regional Administrator, Region 5.